JUNAIDI BIN ABDULLAH

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
TAN SIR DATUK MOHD. JEMURI BIN SERJAN CJ (BORNEO),
TAN SRI DATO' HJ. MOHD. AZMI BIN DATO' HJ. KAMARUDDIN SCJ,
DATO' PEH SWEE CHIN SCJ
[SUPREME COURT CRIMINAL APPEAL NO. 05-38 OP 1989]
21 JULY 1993

CRIMINAL LAW & PROCEDURE: Charge of being in possession of a revolver without lawful excuse - Internal Security Act 1960, s. 57 - Appeal against conviction and sentence -Accused called toenter upon his defence- Whether learned Judge was wrong in law in not examining the evidence at the close of the prosecution case to determine whether aprima facie case had been established - 'Whether Accused ought to have been acquitted atthe close of the case for the prosecution - Criminal Procedure Code, s. 180.

EVIDENCE: Similar fact evidence - Whether admissible - Whether probative value outweighs prejudicial effect.

EVIDENCE: Government Chemist called as expert witness - Giving evidence on servicibility of the revolver - Whether competent to give evidence - Whether only armourer can give evidence on the servicibility of fire-arms - Requirements ofs, 45 Evidence Act 1950.

The Accused was charged with being in possession of a revolver without lawful excuse, an offence under s. 57(l)(a) of the Internal Security Act 1960. The evidence for the prosecution was that the Accused was apprehended in connection with an armed robbery committed in the vicinity of the arrest. The prosecution witnesses gave evidence that the Accused was holding the revolver, the subject matter of the charge, in his right hand at the material time. At the close of the case for the prosecution, Counsel for the Accused conceded that there was a case to answer and the Accused was called to enter upon his defence.

The defence of the Accused was a complete denial of being in physical possession of the revolver at the material time. The Accused contended that the revolver was at all material times in the possession of one Salleh, an armed robber operating in the company of the Accused and two others, and claimed that the prosecution evidence of the recovery of the revolver from his right hand on the morning of 10 April 1984 was a mere fabrication.

The learned Judge rejected the evidence of the Accused and having considered the totality of the evidence, he found the Accused guilty as charged and sentenced him to the mandatory sentence of death. The Accused appealed against his conviction on the ground that the learned Judge was wrong in law in not examining the evidence at the close of the prosecution case to determine whether aprima facie case had been made out by the prosecution.

The Accused further contended that the learned trial Judge was wrong in admitting prejudicial and inadmissiblebadcharacterevidence through PW2 although no objection had been raised by the defence Counsel. The Accused also questioned the competency of the Government Chemist who gave evidence, as an expert witness, on the servicibility of the revolver.

Held:

[1] There is no statutory provision requiring a Judge sitting alone to expressly record his reason before calling the Accused to enter his defence or to state his findings on the credibility of main prosecution witnesses. Mere failure or ommission on the part of a trial Judge to record his grounds for calling for the defence or to record his findings on credibility of witnesses at that stage of the trial is not sufficient by itself for allowing an appeal, particularly when considered in the light of the provisions of ss. 60 and 72 of the Courts of Judicature Act 1964 read together with s. 167 of the Evidence Act 1950 and s. 422 of the Criminal Procedure Code.

[2] The evidence adduced by the prosecution as contained in the appeal record did in fact and in law disclose aprima facie case for the Accused to answer the charge which if unrebutted would warrant a conviction and the Accused was not entitled to an acquittal at the close of the case for the prosecution under s. 180 of the Criminal Procedure Code.

[3] Where the purposes of adducing evidence of similar facts or similar offences is justifiable on grounds of relevancy and necessity to rebut any defence which would otherwise be open to the Accused, it is admissible in evidence provided the probative value of such evidence outweighs its prejudicial value.

[4] The evidence of physical possession of the revolver during the robbery was vital to the defence. To exclude such evidence in the trial would be against the interests of justice as it virtually meant denying the Accused the opportunity of testing his defence in the cross-examination of the prosecution witnesses in addition to denying the prosecution an opportunity to rebut a defence which would otherwise be open to the Accused. In the circumstances, the probative value of the evidence of PW2, relating to who was carrying the fire-arm in the course of the robbery, outweighed its prejudicial value as evidence of bad character.

[5] Although the learned trial Judge had somewhat inaccurately classified the evidence objected to as res gestae instead of evidence of similar facts, such misdescription did not affect the admissibility of the evidence.

[6] The speciality of the skill required of an expert witness under s. 45 of the Evidence Act 1950 would depend on the scientific nature and the complexity of the evidence sought to be proved. In a non-jury trial, it is for the trial Judge himself, as both judge of fact and law, to determine the weight to be attached to such evidence notwithstanding the outstanding qualification or experience (or the lack of it) of the expert. The lack of qualification or experience on the part of the expert must necessarily affect the weight of the evidence rather than its admissibility.

[7] Since the evidence sought to be proved by the prosecution was limited only to servicibility of an ordinary revolver, the Chemist was competent to give expert evidence of such an uncomplicated matter. In the circumstances the trial Court was entitled to accept his position as a Government Chemist as sufficient without going into his academic qualifications or experience although for the sake of completeness it is desirable to do so.

[Appeal dismissed. Conviction upheld. Death sentence affirmed].

[**Bahasa Malaysia** Translation of Headnote]

UNDANG-UNDANG JENAYAH & PROSEDUR: Dituduh memiliki sebuah revolver tanpa sebab disisi undang-undang - Akta Keselamatan Dalam Negeri 1960, s. 57 - Rayuan terhadap kesabitan kesalahan - Sitertuduh dipanggil memasukkan pembelaannya - Samaada Hakim yang bijaksana telah tersilap dan segi undang-undang apabila tidak memeriksa keterangan dipenutupan kes pendakwaan bagi menentukan sama ada suatu kes prima facie telah dibuktikan - Sama ada Sitertuduh sepatutnyadibebaskan dipenutupan kes pendakwaan - Kanun Prosedur Jenayah, s. 180.

KETERANGAN: Keterangan fakta yang serupa - Sama ada boleh diterima - Sama ada nilai probatif melebihi efek kemudaratan.

KETERANGAN: Ahli Kimia Kerajaan dipanggil sebagai saksi pakar - Memberikan keterangan mengenai gunakhidmat revolver - Sama ada layak memberikan keterangan - Sama ada hanya amra boleh memberikan keterangan mengenai guna khidmat senjata api - Kehendak s. 45 Akta Keterangan 1950.

Sitertuduh telah dituduh memiliki sebuah revolver tanpa sebab di sisi undang-undang, suatu kesalahan di bawah s. 57(l)(a) Akta Keselamatan Dalam Negeri 1960. Keterangan pihak pendakwa ialah bahawa Sitertuduh telah ditangkap bersabit dengan suatu rompakan bersenjatayangtelah dilakukan di perkarangan tempat Sitertuduh ditangkap. Saksi-saksi pihak pendakwa memberikan keterangan bahawa Sitertuduh memegang revolver tersebut, halperkara tuduhan tersebut, dalam tangan kanannya pada waktu yang berkenaan. Dipenuntupan kes pendakwaan, Peguam bagi Sitertuduh telah bersetuju bahawa terdapat kes untuk dijawab dan Sitertuduh telah dipanggil untuk memasukkan pembelaannya.

Dalam pembelaan Sitertuduh menafikan langsungyang diaberada dalam milikan fisikal akan revolver tersebut pada waktu yang berkenaan. Sitertuduh menghujahkan bahawa pada setiap masa yang berkenaan revolver tersebut berada dalam milikan seorang lelaki bernama Salleh, seorang perompak bersenjata yang bergiat dengan Sitertuduh dan dua yang lain, dan mendakwa bahawa keterangan pihak pendakwa mengenai penjumpaan revolver daripada tangan kanan sitertuduh pada pagi 10 April 1984 adalah merupakan suatu cerita rekaan semata-mata.

Hakim yang bijaksana tersebut telah menolak keterangan Sitertuduh dan setelah menimbangkan keseluruhan keterangan tersebut, beliau mendapati Sitertuduh bersalah sebagaimana yang dituduh dan menjatuhkan hukuman mati *mandatori*. Sitertuduh membuat rayuan terhadap kesabitan kesalahan tersebut

atas alasan bahawa Hakim yang bijaksana tersebut telah tersilap dari segi undang-undang apabila tidak memeriksa keterangan dipenutupan kes pendakwaan bagi menentukan sama ada suatu kes prima facie telah dibuat oleh pihak pendakwa.

Seterusnya Sitertuduh menghujahkan bahawa Hakim perbicaraan yang bijaksana tersebut telah tersilap apabila menerima keterangan yang memudaratkan dan perwatakan jahat yang tidak boleh diterima melalui PW2 walapun Peguam pembela tidak membuat sebarang bantahan. Sitertuduh juga mempersoalkan kelayakan Ahli Kimia Kerajaan yang memberikan keterangan, sebagai saksi pakar, mengenai khidmatguna revolver tersebut.

Diputuskan:

[1] Tiada peruntukan statutori yang mengkehendaki seorang Hakim yang bersidang sendiri supaya merekodkan sebab-musabab beliau dengan nyatanya sebelum memanggil Sitertuduh memasukkan pembelaannya atau menyatakan kedapatan beliau ke atas kebolehpercayaan saksi utama pihak pendakwa. Kegagalan atau ketinggalan semata-mata oleh seorang Hakim untuk merekodkan alasan-alasan beliau memanggil pembelaan atau merekodkan kedapatan beliau ke atas kebolehpercayaan saksi pada peringkat perbi-caraan, tidaklah mencukupi untuk membenarkan suatu rayuan dibuat, terutamanya apabila dipertimbangkan mengikut ss. 60 & 72 Akta Mahkamah Kehakiman 1964 yang dibaca bersama-sama dengan s. 167 Akta Keterangan 1950 dan s. 422 Kanun Prosedur Jenayah.

[2] Keterangan yang dikemukakan oleh pihak pendakwa sebagaimana yang terkandung dalam rekod rayuan adalah dari segi fakta dan dari g segi undang-undang mendedahkan suatu kes *prima facie* bagi Sitertuduh menjawab tuduhan berkenaan yang mana jika tidak dipatahkan akan membawa kepada kesabitan kesalahan dan Sitertuduh tidak akan berhak kepada pembebasan dipenutupan kes pendakwaan di bawah s. 180 Kanun Prosedur Jenayah.

[3] Di mana tujuan mengemukakan keterangan mengenai fakta yang serupa atau kesalahan yang serupa adalah berjustifikasi atas alasan kerelevanan dan keperluan untuk mematahkan sebarang pembelaan yang mana sebaliknya akan terbuka kepada Sitertuduh, ianya adalah diterima dalam keterangan dengan syarat bahawa nilai probatif keterangan sedemikian melebihi nilai kemudaratan.

[4] Keterangan mengenai pemilikan fisikal akan revolver tersebut sewaktu rompakan adalah penting kepada pihak pembela. Mengecualikan keterangan sedemikian dalam perbicaraan adalah bertentangan dengan kepentingan keadilan kerana ini bermakna menafikan Sitertuduh peluang menguji pembelaannya dalam pemeriksaan balas akan saksi-saksi pendakwa dan sebagai tambahan menafikan pihak pendakwa peluang untuk mematahkan pembelaan sedemikian yang mana sebaliknya akan terbuka kepada Sitertuduh. Dalam hal ini, nilai probatif akan keterangan PW2, berhubung dengan siapa yang membawa senjata api sewaktu rompakan, melebihi nilai kemudaratannya sebagai keterangan perwatakan jahat.

[5] Walaupun Hakim yang bijaksana tersebut telah tersilap apabila mengkelaskan dengan kurang tepat akan keterangan yang dibantah sebagai *resgestae* dan bukan sebagai keterangan fakta yang serupa, keperihalan yang salah seperti itu tidak menjejaskan penerimaan keterangan.

[6] Keistimewaan kemahiran yang dikehendaki daripada seorang saksi pakar di bawah s. 45 Akta Keterangan 1950 akan bergantung ke atas sifat saintifik dan kerumitan keterangan yang dipohon untuk dibuktikan. Dalam sesuatu perbicaraan tanpa juri, adalah terpulang kepada Hakim perbicaraan tersebut, sebagai hakim fakta dan undang-undang untuk menentukan pertimbangan yang perlu diberikan kepada keterangan sedemikian tanpa mengambilkira kelayakan atau pengalaman saksi yang begitu tinggi (ataupun kekurangannya). Kekurangan kelayakan atau pengalaman saksi sudah tentu akan menjejaskan pertimbangan keterangan berbanding dengan penerimaannya.

[7] Memandangkan keterangan yang dipohon yang perlu dibuktikan oleh pihak pendakwa terhad hanya kepada gunakhidmat sebuah re-volver biasa, Ahli Kimia tersebut adalah layak untuk memberikan keterangan pakar men-genai perkara yang tidak merumitkan seperti itu. Dalam hal ini, Hakim perbicaraan adalah berhak untuk menerima kedudukannya sebagai seorang Ahli Kimia Kerajaan sebagai mencukupi tanpa mengetahui mengenai kelayakan atau

pengalamannya walaupun demi sebagai suatu perkara yang menyeluruh, adalah baik untuk berbuat sedemikian.

[Rayuan ditolak. Kesabitan kesalahan dikekalkan. Hukwnan mati disahkan].

Cases referred to:

Haw Tua Tau v. Public Prosecutor [1981] CLJ 123/ [1981] 2 MLJ 49 (***foll***)

Munusamy v. Public Prosecutor [1987] 1 CLJ 250/ [1987] 1 MLJ 492 at 496 (***foll***)

Public Prosecutor v. Chin Yoke [1940] MLJ Rep. 37 (***foll***)

Yap Chai Chai & Anor. v. Public Prosecutor [1973] 1 MLJ 219 (***foll***)

Ng Peng Choon v. Public Prosecutor [1947] MLJ 87 (***cit***)

Govindasamy v. Public Prosecutor [1949] MLJ 101 (***refd***)

Public Prosecutor v. Sihabudin [1980] 2 MLJ 273 (***cit***)

Makin v. Atorney-General for New South Wales [1894] AC 57 (***foll***)

Public Prosecutor v. Ong Kok Tan [1969] 1 MLJ 118 (***cit***)

G.F.L. Ewin v. Public Prosecutor [1949] IB MLJ 279 at 281 (***foll***)

Noor Mohamed v. the King [1949] AC 182 (***cit***)

R. v. Straffen [1952] 2 AER 657 (***cit***)

R. v. Horwood [1969] 3 AER 1156 (***cit***)

Boardman v. Director of Public Prosecutions [1974] 3 AER 887 (***foll***)

Harris v. Director of Public Prosecutions [1952] 1 AER 1044 at 1047 (***cit***)

Maxwell v. Director of Public Prosecutions [1935] AC 309 at 317 (***refd***)

R v. Robinson [1953] 37 Cr. App. Rep 95 at 106 (***cit***)

Public Prosecutor v. Veeran Kutty and Anor [1990] 2 CLJ 673 1 [1990] 3 MLJ 499 (***refd***)

Malaysia National Insurance Sdn. Bhd. v. Malaysia Rubber Development Corporation [1986] 2 CLJ 285/[1986] 2 MLJ 124 at 127 (***refd***)

Data' Mokhtar bin Hashini v. Public Prosecutor [1983] 2 CLJ 10 1 [1983] 2 MLJ 232 (***foll***)

Public Prosecutor v. Muhamed bin Sulaiman [1982] CLJ 540 1 [1982] 2 MLJ 320 (***foll***)

Public Prosecutor v. Virammal, AIR [1923] Mad. 178 (***refd***)

Legislation referred to:

Criminal Procedure Code, ss. 173(f), 180 & 204(2)
Evidence Act, ss. 11, 14, 15 & 45
Internal Security Act 1960, s. 57(l)(a)

For the appellant - Karpal Singh; Mis. Karpal Singh & Co.

For the respondent - Suriyadi bin Halim Omar, SFC

JUDGMENT

Hj. Mohd. Azmi bin Dato' Hj. Kamaruddin SCJ:

The appellant was convicted for possession of a fire-arm under s. 57(l)(a) of the Internal Security Act 1960 and sentenced to death by the High Court at Johore Baharu.

The charge was on the following terms:

> That you on 10 April 1984 at about 5.10 a.m. in the vicinity of an unnumbered house in Kampong Maju Jaya, Pekan Nenas, in the District of Pontian, in the State of Johor, within a security area as proclaimed by the Yang Di Pertuan Agong (vide Proclamation P.U. (A) 148 of 1969 dated 15 May 1969), without lawful excuse, did have in your possession a fire-arm, to wit, a revolver Colt 0. 38 Special serial number 811073 without lawful authority and that you thereby committed an offence under s. 57(l)(a) of the Internal Security Act 1960 and punishable under s. 57 of the same Act.

The case for the prosecution could be summarised as follows. At about 4.00 a.m. on 10 April 1984, a suspect by the name of Tajuddin bin Zainon (PW2) whilst in police custody, led a police party to Kampong Maju Jaya, Pekan Nenas, Pontian, to affect the arrest of four persons in connection with an armed robbery committed in the vicinity. At an unnumbered plank house, Tajuddin called out the name "Jaafar" and at the same time a Police Officer knocked on the plank wall. Suddenly a human figure jumped out of a window and ran out of the house. Police Constable Ismail (PW3) and DPC Zainuddin (now deceased) gave chase and were successful in arresting the fleeing figure, who was identified as the appellant. From the right hand of the appellant the police recovered the subject matter of the charge, a revolver (Ex. P3), loaded with five rounds of ammunition. In the course of Police investigations, the revolver was sent to the Chemistry Department to determine its servicibility. Test firing was conducted by Mr. Cheong Meow Kioon (PW6) who testified in Court as an expert witness that the fire-arm was serviceable. At the close of case for the prosecution, Encik Yacob Atan, Counsel assigned as defence Counsel in the Court below indicated to the learned trial Judge that he did not wish to make any submission for an order of acquittal at that stage, as he conceded that there was a prima facie case to answer. His actual words were:

> I concede there is a case and do not wish to submit.

At Counsel's request, the trial was adjourned to the next day, and at the resumption of hearing

the appellant was called to enter his defence. The appellant had no witness, but he elected to give evidence on oath. In his defence he testified that he was empty-handed at the relevant time of his arrest and therefore was not in a possession of the revolver as alleged in the charge. To support his story, he said he knew that a person named Salleh was almost all the time handling the revolver and as such the police could not possibly have found it in his right hand on the morning in question. After considering the defence, the learned trial Judge found the appellant guilty as charged and passed the mandatory death sentence.

In his seven-page grounds of judgment the learned Judge was clearly of the opinion that the defence had not raised any reasonable doubt in the prosecution case, and he concluded by stating:

> After considering all the evidence presented by the prosecution and the defence as a whole I found the Accused guilty as charged. I then convicted him and passed the mandatory death sentence.

Mr. Karpal Singh who argued the appeal before us had three major complaints against the conviction of the appellant. It is convenient to dispose first the question of whether the appellant ought to have been acquitted at the close of case for the prosecution which the Court was empowered to order under s. 180 of Criminal Procedure Code. It was argued that the learned trial Judge was wrong in law in not examining the evidence at the close of the prosecution case to determine whether a prima facie case had been established by the prosecution. On the evidence presented by the prosecution we did not really understand why there should be any doubt as to the propriety of the order to call for the defence. The principle to be applied at the g close of the case for the prosecution in a jury trial as laid down by the Privy Council in *Haw Tua Tau v. Public Prosecutor* [1981] 2 MLJ 49 had been considered by this Court in *Munusamy v. Public Prosecutor* [1987] 1 MLJ 492 at 496. The unanimous opinion of the Supreme Court in Munusamy was that in so far as a trial before a single Judge was concerned, *Haw Tua Tau* did not exclude or disapprove the application of the long established prima facie case principle at the close of the prosecution case as envisaged in ss. 173(f) and 180 of the Criminal Procedure Code. There was no conflict in substance between the principle established in *Haw Tua Tau* and the principle consistently followed in this country since 1940 as laid down in *Public Prosecutor v. Chin Yoke* [1940] MLJ Rep. 37. On the evidence adduced by the six prosecution witnesses in the instant appeal, this was clearly not a case where it could be said that there was no evidence at all to prove one or more of the essential ingredients of the offence under s. 57(l)(a) of the Internal Security Act. The only apparent omission here was the fact that before making the order calling for the defence, neither in the notes of evidence nor in his grounds of judgment did the learned Judge expressly record why he was satisfied that there was a *prima facie case* to answer, or why in his opinion the prosecution had established a *prima facie* case, which if unrebutted would warrant a conviction.

In *Yap Chai Chai & Anor. v. Public Prosecutor* [1973] 1 MLJ 219 in an appeal to the then Federal Court against conviction on a murder charge, it was argued that it was mandatory for the trial Judge at the close of the prosecution case to enter on the record his opinion that there was a case to answer and that his failure to do so rendered the trial a nullity. In dismissing the appeal, Ong CJ said at page 221:

> Leaving aside for the moment the second appellant's statement, we are clearly of opinion that the facts which were indisputable had established a clear *prima facie* case, and that the learned trial Judge would have been wrong to withdraw the case at that stage from the jury. We do not think that the provisions of s. 204(2) of the Criminal Procedure Code (S.S.) had any application, nor do we agree with the contention of Datuk S.P. Seenivasagam that it was mandatory for the Judge at the close of the prosecution to enter on the record his opinion that there was a case to answer - the failure to do so rendering the trial a nullity. As authority for this proposition two cases were cited to us, being the judgments delivered by Willan CJ in *Ng Peng Choon v.Public Prosecutor* [1947] MLJ 87 and *Govindasamy v. Public Prosecutor* [1949] MLJ 101. In our opinion the provisions relating to trials with assessors, as in those cases, have no application to jury trials; in any event, we must say, with all respect, that we unanimously disagree with the learned Chief Justice. What is always of paramount importance in the administration of criminal justice is a fair trial - not such excessive legalism as to give the ordinary meaning of words the sacrosancity of a ritual.

In our opinion, there is also no statutory provision requiring a Judge sitting alone to expressly record his reason before calling the Accused to enter his defence or to state his findings on the credibility of main prosecution witnesses. But, as a matter of practice, where there is a particular reason for doing so, such as where a submission of no case to answer has been made in a complex case, or where the Accused is called to enter a defence on a lesser or alternative charge, Judges do sometimes give their reasons. In uncomplicated cases, such as in the instant appeal, it is not obligatory or even necessary to do so. By calling an Accused to enter his defence, it should be assumed that the trial Judge must on evaluation of the evidence, have been satisfied that the prosecution has, at that stage of the trial, established a prima facie case, which if unrebutted would warrant a conviction of the Accused. To arrive at such a conclusion, it is inherent that the Judge must consider all the evidence adduced by the prosecution as tested in cross-examination, on a prima facie basis. In this appeal the establishment of a *prima facie* case of unlawful possession of fire-arm under s. 57 of Internal Security Act was so obvious even to the defence Counsel that it became academic and unnecessary for the Court to consider an order of acquittal under s . 180 of the Criminal Procedure Code. Thus, when the learned Judge called for the defence in the present case, he must have been satisfied that there was a *prima facie* case to answer, which if unrebutted would warrant a conviction, and it was not mandatory for him to record the reasons for his satisfaction, even if there had been no concession made by the defence Counsel. However, whether the Judge was actually correct in law in calling for the defence was of course open for review on appeal to this Court. Be that as it may, we hold the view that mere failure or omission on the part of a trial Judge to record his grounds for calling for the defence or to record his findings on credibility of witnesses at that stage of the trial is not sufficient by itself for allowing an appeal, particularly when considered in the light of the provisions of ss. 60 and 72 of the Courts of Judicature Act read together with s. 167 of Evidence Act and s. 422 of the Criminal Procedure Code.

We must however stress that notwithstanding the concession made by the defence Counsel at the trial, it was still open and indeed incumbent upon us at this appellate stage to examine the appeal record and to satisfy ourselves that there was in fact and in law a case for the appellant to answer. Having done so, we were of the view that the evidence adduced by the prosecution as contained in the appeal record did in fact and in law disclose aprima facie case for the Accused to answer the charge which if unrebutted would warrant a conviction.

The suggestion of Mr. Karpal Singh that the trial Judge had automatically called for the defence on account of Regulation 13 of the Essential (Security Cases) Regulation 1976 contrary to the principle enunciated in *Public Prosecutor v. Sihabudin* [1980] 2 MLJ 273 was based on pure conjecture, and as such it must be rejected.

From the appeal record, we were satisfied that the appellant was not entitled to an acquittal at the close of the case for the prosecution under s. 180 of the Criminal Procedure Code. Accordingly this particular ground of appeal failed.

The second argument advanced by Mr. Karpal Singh was that the learned trial Judge was wrong in admitting prejudicial and inadmissible bad character evidence through Tajuddin (PW2), although no objection had been raised by the defence Counsel. The evidence of Tajuddin objected to was as follows:

> ... I saw him handling a fire-arm at night in the course of a robbery. The robbery took place at the 33rd milestone, Jalan Pontian...

The defence in this case was a complete denial by the appellant of being in physical possession of the revolver as alleged. Although the appellant did not challenge the fact of his arrest, he denied that the revolver was found in his right hand at the material time. It was his contention that the said fire-arm was all along in the possession of a person named Salleh. As it was entitled and indeed under a duty to do, the defence had, at an early stage of the trial, put this vital part of the defence in the cross-examination of the first and second prosecution witnesses, namely DSP Mustaffa Kamil (PW1), and Tajuddin (PW2) the suspect who had led the police party to the scene of arrest. The total effect of this particular aspect of the cross-examination was to put to the prosecution witness that this particular revolver (Ex. P3) was at all material times in the possession of Salleh, an armed robber operating in the company of the appellant and two others (Jaafar and Othman), and as such the defence sought to

prove that the revolver could not have been in the appellant's possession at the time of his arrest. The fact of the armed robbery that took place prior to his arrest, formed ajti essential part of the appellant's defence to establish that the recovery by the police of the revolver from his right hand on the early morning of 10 April 1984, was a mere fabrication. He explained that the only time on that day he had come to be in physical possession of the fire-arm was when he was asked by Salleh to hold it for him momentarily during a pillion ride, to enable Salleh to manage the motor cycle oh which they were riding. He had however returned the revolver to Salleh after the motorcycle ride, and did not know what had happened to it after that. According to the appellant, after his arrest, he was led by the police to a spot about ten yards away, where the revolver had been planted, and that was where the police had actually recovered it. At the close of the defence, the learned Judge did d not find the appellant a credible witness, and having considered the totality of the evidence, he found the appellant guilty as charged.

Since the evidence of the armed robbery was an integral part of the defence, it would not be in the interests of justice to exclude it on grounds of bad character evidence. It was a relevant and indeed necessary piece of evidence for the purpose of establishing that it was Salleh and not the appellant, who was armed with a revolver, and as such it was unlikely for the appellant to be in possession of the fire-arm shortly afterwards at the material time of his arrest. The armed gang robbery was a material fact in issue as far as the defence was concerned for the purpose of creating a reasonable doubt in the prosecution case on the issue of possession of the fire-arm. Since this line of defence had already been indicated during cross-examination of DSP Mustaffa Kamil (PW1), we were of the view that s the evidence of Tajuddin (PW2) on the armed robbery in which the appellant was involved, was admissible in evidence to rebut that defence, on the principle enunciated in *Makin v. Atorney-General for New South Wales* [1894] AC 57, where at page 65 the Privy Council speaking through Lord Herschell LC laid down the following principle on the admissibility of evidence of similar facts:

> In their Lordship's opinion the principles which must govern the decision of the case are clear, though the application of them is by no means free from difficulty. It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the Accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the Accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the Accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other.

The dictum of the Lord Chancellor was considered and applied locally in *Public Prosecutor v. Ong Kok Tan* [1969] 1 MLJ 118 at 120 in connection with s. 15 of the Evidence Act. Much earlier, Willan, CJ in the case of *G.F.L. Ewin v. Public Prosecutor* [1949] 15 MLJ 279 at 281, had conveniently divided the said principle into two distinct parts:

> (a) It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the Accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the Accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried; and
>
> (b) ... the mere fact that the evidence adduced tends to showthe commissionof other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged were designed or accidental, or to rebut a defence which would otherwise be open to the Accused.

In Ewin's case, in considering the question of admissibility of evidence of similar offences of shooting by the appellant of the headman of a Chinese tin mine not long prior to the shooting of the child, the subject matter of the murder with which he was charged, the appellate Court at page 282 required the prosecution to justify the admission of such evidence on the basis of the principles in Makin's case, rather than on the principle of Res Gestae.

The principles laid down in Makin's case were further stressed by the Privy Council in *Noor Mohamed v. the King* [1949] AC 182 and applied by the Court of Appeal in. R v. Straffen [1952] 2 AER 657, and R v. Horwood [1969] 3 AER 1156, and by the House of Lords in *Boardman v. Director of Public Prosecutions* [1974] 3 AER 887. In Boardman's case, Lord Morris had this to say at pp. 892 - 893:

> The line separating exclusion and admission will often, as Lord Herschell LC said, be difficult to draw. In some cases a ruling will be sought from a Judge at the time when certain evidence is tendered. The Judge will then have to decide whether a particular piece of evidence is on the one side or the other and whether, in the words of Viscount Simon in *Harris v. Director of Public Prosecutions* [1952] 1 AER 1044 at 1047, the evidence which it is proposed to adduce is sufficiently substantial having regard to the purpose to which it is professedly directed to make it desirable in the interest of justice that it should be admitted. But at whatever stage a Judge gives a ruling he must exercise his judgment and his discretion having in mind both the requirements of fairness and also the requirements of justice. The first limb of what was said by Lord Herschell LC in *Makin's* case was said by Viscount Sankey LC in *Maxwell v. Director of Public Prosecutions* [1935] AC 309 at 317 to express 'one of the most deeply rooted and jealously guarded principles of our criminal law.' Judges can be trusted not to allow so fundamental a principle to be eroded. On the other hand, there are occasions and situations in which in the interests of justice certain evidence should be tendered and is admissible in spite of the fact that it may or will tend to show guilt in the Accused of some offence other than that with which he is charged. In the, second limb of what he said in Makin's case Lord Herschell LC gave certain examples. In his speech in *Harris v. Director of Public Prosecutions*, Viscount Simon pointed out that it would be an error to attempt to draw up a closed list of the sorts of cases in which the principle operates. Just as a closed list need not be contemplated so also, where what is important is the application of principle, the use of labels or definitive descriptions cannot be either comprehensive or restrictive. While there may be many reasons why what is called 'similar fact' evidence is admissible there are some cases where words used by Hallett J. are apt. In *R. v. Robinson* [1953] 37 Cr. App. Rep 96 at 106, he said:

> If a jury are precluded by some rule of law from taking the view that something is a coincidence which is against all the probabilities if the Accused person is innocent, then it would seem to be a doctrine of law which prevents a jury from using what looks like ordinary common sense.

> But as Viscount Simon pointed out in *Harris v. Director of Public Prosecutions* evidence of other occurrences which merely tend to deepen suspicion does not go to prove guilt; so evidence of 'similar facts' should be excluded unless such evidence has a really material bearing on the issues to be decided. I think that it follows from this that, to be admissible, evidence must be related to something more than isolated instances of the same kind of offence.

On the principle laid down in *Makin's* case and *Boardman's* case, we are of the opinion that where the purpose of adducing evidence of similar facts or similar offences is justifiable on ground of relevancy and necessity to rebut any defence which would otherwise be open to the Accused (in addition to those under ss. 14 and 15 of the Evidence Act) it is admissible in evidence provided the probative value of such evidence outweighs its prejudicial value. There must be a real anticipated defence to be rebutted and not merely "crediting the Accused with a fancy defence" as emphasised by the Privy Council in *Noor Mohamed v. the King* at page 192.

In the present case, the moment DSP Mustapha Kamil (PW1) was cross-examined by the defence Counsel on who, according to Tajuddin, had the fire-arm, it was a reasonable indication by the defence to the prosecution that the appellant's defence would be one of complete denial of possession of the revolver by showing that he was unarmed and that it was Salleh who physically had the revolver, and as such the prosecution was entitled to adduce evidence through Tajuddin (PW2) to rebut such defence.

Indeed, as alluded to earlier, the evidence of physical possession of the revolver during the robbery was vital to the defence and relevant under 8,11 of the Evidence Act to cast a reasonable doubt in the prosecution case that the accused was in possession of the revolver at the time of his arrest, and thereby would tilt the balance in the appellant's favour (if such evidence was accepted as probable) that the revolver could not have been in his right hand at the time of his arrest. Since the evidence of the armed robbery formed a vital part of the defence, it was difficult not to agree in the

circumstances of this case that the probative value of such evidence would outweigh its prejudicial value as evidence of bad character. To exclude such evidence in the trial would be against the interest of justice, as it virtually meant denying the Accused the opportunity of testing his defence in the cross-examination of prosecution's witnesses. It would also deny the prosecution the opportunity to rebut a defence which would otherwise be open to the Accused. In our view, that was why the defence Counsel at the trial had intentionally introduced the evidence of similar facts, and cross-examined Tajuddin extensively on the armed robbery, instead of avoiding it altogether as evidence of bad character. Unfortunately for the appellant, the testimony of Tajuddin did not come to defence expectation.

In *Public Prosecutor v. Veeran Kutty and Anor.* [1990] 3 MLJ 499, a case involving somewhat a reverse situation, Peh Swee Chin J. (as he then was) expressed his regrets at page 504 for not being referred to *Boardman's* case, in the following words:

> The net result is that, if the *Boardman* case had been cited'to me or otherwise brought to my attention, I would have ruled that the evidence of armed robbery would have been admissible as the prejudicial effect of such evidence would have been overridden by the striking similarity of the evidence in question, for reason different from learned defence Counsel's. I do hold that the evidence of the armed robbery was admissible as contended by learned defence Counsel and that the Boardman case is applicable in our Courts as it has merely modified the ratio in the Makin case, the latter case having been relied on and accepted in our Courts for a long time (please see e.g. *Public Prosecutor v. Ong Kok Tan*) and the reasoning of the Learned Law Lords in Boardman has impeccable logic.

We are of the view that just as disputed hearsay evidence, does not become admissible by reason of a failure to object [see *Malaysia National Insurance Sdn. Bhd. v. Malaysia Rubber Development Corporation* [1986] 2 MLJ 124 at 127] admissible evidence of similar facts does not become inadmissible by reason of describing it wrongly. Thus, although the learned trial Judge had somewhat inaccurately classified the evidence objected to as res gestae instead of evidence of similar facts, we were of the view that such misdescription did not affect its admissibility. In the circumstances, this ground of appeal must also be rejected.

The last ground of appeal that merited our consideration related to the admissibility of the evidence of the government chemist, Mr. Cheong Meow Kioon (PW6). It concerned the competency of Mr. Cheong to give evidence on the servicibility of the revolver as an expert witness under s. 45 of the Evidence Act. Mr. Karpal Singh seemed to suggest that only an armourer could give evidence on the servicibility of fire-arms. He cited the judgment of Hashim Yeop Sani J. in *Dato' Mokhtar bin Hashim v. Public Prosecutor* [1983] 2 MLJ 232 in the High Court where at page 255 the learned Judge had applied the same test as Suffian, LP in *Public Prosecutor v. Muhamed bin Sulaiman* [1982] 2 MLJ 320 on the admissibility of the opinion of witnesses possessing particular skills.

It must be stressed at the outset that unlike the appeal before us, both authorities cited had reference to a charge of murder, but like it the expert witness was not an armourer but a chemist. Further the evidence sought to be adduced by the chemist in those cases was of a complex and scientific nature which was whether e or not a particular bullet which had killed the deceased had been fired through the barrel of a particular fire-arm which belonged to the Accused. In both cases, the chemist was held to be a competent witness to express a forensic opinion in the matter, although in *Muhamed bin Sulaiman's* case, the chemist had no academic training in forensic ballistics. At page 323 Suffian LP said:

> The only question was, is Mr. Lum *perltus,* is he skilled, is he skilled in determining whether a particular bullet has gone through the barrel of a particular rifle. He need not become so skilled in any particular way nor by special study nor professionally. It is enough if he has had sufficient experience, sufficient practical experience, to acquire the necessary skill, so that he has adequate knowledge.

In Dato' *Mokhtar bin Hashim's* case, Hashim Yeop A Sani J. echoed the same principle when he said at page 255:

> ... To qualify to give such evidence the witness must satisfy the Court that he is indeed an expert, that he is specially skilled in the field of the enquiry carried out by him. An expert is one who is skilled in any particular art, trade or profession being

> possessed of peculiar knowledge concerning the same. The witness must have made a special study of the subject or have acquired special experience on the subject. A similar question arose in the case of *R. v. Silverlock* where handwriting was in issue, and of the person to give expert evidence Lord Russel of Killowen CJ said "Is he peritust Is he skilled. Has he an adequate knowledge?

The distinction between the present appeal and those two authorities on which Mr. Karpal Singh had placed heavy reliance was obvious. The expert evidence of the chemist given in the instant case was limited to the servicibility of the revolver, whereas in the two authorities cited, the chemist went beyond mere test-firing to determine servicibility, but gave evidence on the science of forensic ballistics to conclude an opinion that a particular bullet had gone through the barrel of a fire-arm belonging to the Accused, which would accordingly connect the Accused with the crime of murder.

In *Muhamed bin Sulaiman's* case, the Federal Court comprising Suffian LP, Wan Sulaiman, FJ and Abdul Hamid FJ ruled at page 322 that although Mr. Lum, the Chemist, admitted that he had no academic training in forensic ballistics, but by virtue of his education, his scientific qualification and his practical experience gained in the Department of Chemistry and "especially considering that Mr. Lum had not been shaken in cross-examination", that was sufficient for the Court to conclude that he had adequate knowledge on the matter, and that the trial Judge "should have treated the evidence as admissible and left the question of its weight to the Jury". Although in *Dato' Mokhtar bin Hashim's* case, the murder charge was conducted in a security trial, Hashim Yeop A. Sani J., (as he then was) followed and adopted the same test as was applied in *Muhamed bin Sulaiman*. The two authorities relied upon by Mr. Karpal Singh did not therefore support his contention that only an armourer could give expert evidence on servicibility of a revolver. If a chemist was competent to give expert evidence on the science of forensic ballistic, there could be , no conceivable reason why a chemist like Mr. Cheong Meow Kioon could not equally be accepted as an expert on mere servicibility of an ordinary revolver.

In our view the test to be applied for the purpose of s. 45 of the Evidence Act is this. First, does the nature of the evidence require special skill? Second, if so, has the witness acquired the necessary skill either by academic qualification or experience so that he has adequate knowledge to express an opinion on the matter under enquiry? The answer to both questions must necessarily depend on the facts of each particular case. The speciality of the skill required of an expert witness under s. 45 would depend on the scientific nature and complexity of the evidence sought to be proved. The more scientific and complex the subject matter, the more extensive and deeper will the Court be required to enquire in the ascertainment of his qualification or experience in the particular field of art, trade or profession. But in the final analysis in a non jury trial, it is for the trial Judge himself as both Judge of fact and law to determine the weight to be attached to such evidence notwithstanding the outstanding qualification or experience (or the lack of it) of the expert. To use the words of Suffian LP at page 323 in *Muhamed bin Sulaiman* when he applied the case of *Public Prosecutor v. Virammal* AIR [1923] Mad. 178, the jurors themselves, "could have used a magnifying glass or their own eyes and their own mind to the evidence and verify the results submitted to them" by the expert witness. The lack of qualification or experience on the part of the expert must necessarily affect the weight of the evidence rather than admissibility. But where the evidence is of complex and scientific nature, the absence of both qualification or experience can certainly affect admissibility. No hard and fast rule should be laid down on the issue of competency of an expert witness. In non-complicated matters, considerable laxity must however be applied in practice [see judgment of Abdoolcader, FJ in *Dato' Mokhtar bin Hashim* case [1983] 2MLJ270 at 278]. As stated by this Court in *Munusamy v. Public Prosecutor* [1987] 1 MLJ 492 at 496:

> As a rule, a chemist in drug cases does not give any opinion as to the ownership, control or possession of the substance sent for analysis, but he merely reports the result of the chemical examination of the substance. The only reason for sending the exhibits to the chemist is to determine their identity and to confirm what other witnesses have suspected. This type of opinion must in our view be distinguished from opinions which are of very technical or complicated nature, such as those given by handwriting, trade mark, copy- right or ballistic experts. Without being derogatory it is common knowledge that even animals, such as snuff dogs when

> sufficiently trained, are able to detect certain dangerous drugs. We are therefore of the view, that in this type of cases where the opinion of the chemist is confined only to the elementary nature and identity of substance, the Court is entitled to accept the opinion of the expert on its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion.

We were therefore of the opinion that since the evidence sought to be proved by the prosecution was limited only to servicibility of an ordinary revolver, Mr. Cheong (PW6) a Chemist in the Chemistry Department was competent to give expert evidence of such uncomplicated matter. In the circumstances of this case, the Court was entitled to accept his position as a Government Chemist as sufficient, without going into his academic qualification or experience, although for the sake of completeness it is desirable to do so. Therefore, the last ground of appeal must equally be rejected.

For the above reasons the appeal was dismissed, the conviction was upheld and the death sentence affirmed.